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# 90-580

No.

Supreme Court, U.S.
FILED
SEP 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

October Term, 1990

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Kondian R. Rajaram, Petitioner,

v.

International Typographical Union
(Currently known as "Printing, Publishing
& Media Workers Sector of the
Communications Workers of America");

Baltimore Typographical Union No. 12;

Sunpapers Chapel of
Baltimore Typographical Union No. 12;

Jack Jerome Poist;

Gary Kidwell; Respondents,

and

A.S. Abell Publishing Company, Defendant

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Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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Appendix Accompanying the
Petition for Writ of Certiorari

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Kondian R. Rajaram
1746 Eastern Avenue
Baltimore, MD 21231
Tel. (301) 563-0990
Pro Se Petitioner

## APPENDIX

[Under instructions of the personnel of the Clerk's Office that an appendix attached to a petition be small, reproduction of materials in full is limited to some of those documents considered coming under Rule 14.1.(k)(i), (ii), & (iii). The material considered coming under Rule 14.1.(k)(i) is considered as coming under (iv) also. Materials considered coming under Rule 14.1.(k)(v) are heavily limited both in number of entries and portion(s) of each entry, except for document identification and relevant lines of the text; statutes and rules, which appear in printed form and exist in the library, are also not reproduced. If the petition for writ of certiorari to review a decision of the circuit court is granted, petitioner's then-retained counsel will provide additional documentary support while briefing the Court and while arguing before the Court.]

Rule 14.1.(k)(i) at pages 2a-4a.

Rule 14.1.(k)(ii) at pages 5a-144a.

Rule 14.1.(k)(iii) at pages 145a-146a.

Rule 14.1.(k)(v) at pages 147a-152a.

[[ Rule 14.1.(k)(i) ]]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 89-3375

KONDIAN R. RAJARAM, Plaintiff-Appellant,

versus

INTERNATIONAL TYPOGRAPHICAL UNION;
BALTIMORE TYPOGRAPHICAL UNION NO. 12;
JACK POIST; GARY KIDWELL,

Defendants-Appellees,

and

SUNPAPERS CHAPEL OF BALTIMORE
TYPOGRAPHICAL UNION NO. 12;
A.S. ABELL PUBLISHING COMPANY,

Defendants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Walter E. Black, Jr., District Judge. (C/A No. 80-12-B)

Submitted: April 12, 1990

Decided: June 20, 1990

Before PHILLIPS and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Kondian R. Rajaram, Appellant Pro Se.

Brian A. Powers, O'DONOGHUE & O'DONOGHUE, Washington, D.C.; Bernard Wolf Rubenstein, ABATO, RUBENSTEIN & ABATO, P.A., Lutherville, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Kondian R. Rajaram appeals from the district court's order denying Rajaram's Fed. R. Civ. P. 60(b) motion. Our review of the record and the district court's opinion discloses that the district court did not abuse its discretion and this appeal is without merit. Accordingly, we

affirm on the reasoning of the district court. Rajaram v. International Typographical Union, C/A No. 80-12-B (D. Md. April 15, 1987). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process. **AFFIRMED**

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[[ Rule 14.1.(k)(ii) ]]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM (entered October (20, 1983)

vs.

INTERNATIONAL TYPOGRAPHICAL UNION; and

BALTIMORE TYPOGRAPHICAL UNION NO. 12;

and SUNPAPERS CHAPEL OF BALTIMORE

TYPOGRAPHICAL UNION NO. 12; and

JACK POIST and

GARY KIDWELL;

A.S. ABELL PUBLISHING COMPANY

CIVIL NO. B 80-0012

MAGISTRATE'S REPORT AND RECOMMENDATION

I.

Plaintiff, Kondian R. Rajaram, is a member of defendant Union International Typographical Union (ITU), Baltimore Typographical Union No. 12 (BTU-12) and Sunpapers Chapel of Baltimore Typographical Union No. 12 (Sun Chapel). As a union member, he worked as a

contract substitute employee on a casual basis for defendant A.S. Abell Publishing Co. (Abell) until July 1978, when substitute work was eliminated. Plaintiff alleges that the elimination of this substitute work was motivated by intentional discrimination on the parts of all of the defendants.

Plaintiff filed his initial complaint, pro se, on January 4, 1980, naming ITU, BTU-12, Sun Chapel, Poist, and Kidwell as defendants. (Paper #1). On September 13, 1982, plaintiff obtained counsel to represent him, and an amended complaint was filed, with leave of court, on September 24, 1982. (Paper #46). Finally, on January 20, 1983, plaintiff filed a second amended complaint that named, for the first time, Abell as a defendant. (Paper #53). On February 28, 1983. Abell moved for dismissal or, in the alternative, for

summary judgment. (Paper #58). By previous order of Judge Black, dated July 27, 1982, the case had been referred to me in accordance with Local Rule 80. The pending motions in the case were all heard on October 12, 1983.

II.

Plaintiff alleges that Abell violated plaintiff's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. S 2000e et seq., by aiding and assisting the other named defendants in:

(1) maintaining a provision in the Union bylaws that required plaintiff to seek internal Union remedies before he was allowed to resort to a discrimination charge under Title VII;

(2) maintaining a provision in the Union bylaws which forced plaintiff to seek internal Union remedies at considerable expense to plaintiff and that had the effect of prohibiting plaintiff from exercising his Title VII remedies for an indefinite period of time;

(3) limiting plaintiff's employment opportunities by giving a job to a white worker, of lower priority

status than plaintiff, which was due plaintiff (contrary to the provisions of 42 U.S.C. S 2000e-2(a)(1); and

(4) discriminating against plaintiff because of the latter's opposition to Abell's hiring practices (contrary to the provisions of 42 U.S.C. S 2000e-3(a)).

The Court has determined that these claims under Title VII must be dismissed because plaintiff failed to exhaust his administrative remedies with the EEOC as required under 42 U.S.C. S 2000e-5.

Plaintiff claims that the District Court "has jurisdiction to hear a complaint even though the matter has not been presented to the EEOC, where the failure to present the matter is inadvertent" (Paper #59), and he cites Sharma v. Opportunities Industrialization Center, 342 F. Supp. 209 (E.D. Wis. 1972), in support of this contention. However, in Sharma, the court was faced with the issue of whether plaintiff's

failure to comply with the exhaustion requirements under Title VII precluded his action under 42 U.S.C. S 1981. The court held that plaintiff could proceed with his S 1981 action in lieu of his Title VII remedy if there was reasonable excuse for plaintiff's failure to exhaust his Title VII remedies. Thus, sharma is entirely beside the present point.

Plaintiff also cites Movement for Opportunity and Equality v. General Motors Corp., 622 F. 2d 1235 (7th Cir. 1980), in support of his contention that the exhaustion of administrative remedies is not required. However, the court in that case stated that there are strict requirements for the plaintiff to (1) file a charge with the EEOC and 2) (sic) receive the right to sue letter from the EEOC and act on it within the requisite time. These requirements can only be relaxed when the plaintiff's failure to

sue is due to misleading acts by the EEOC, the employer, or the union. Here, there is no evidence that the EEOC, Abell, or the unions misled plaintiff into believing that he had a complaint only against the unions, rather than against the unions and Abell together. In that plaintiff has never filed an EEOC claim against Abell, he is absolutely barred from proceeding under Title VII against that company. Bickley v. Univ. of Md., 527 F. Supp. 174, 179 (D.Md. 1981).

Plaintiff has had actual knowledge of his Title VII rights since August 30, 1978, yet he has never filed a discrimination claim against Abell with the EEOC. The courts do not treat the charges made to the EEOC as strictly as they would common law pleadings, in that the EEOC can expand the charges made against a specific defendant based on its

investigation. EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976). However, the courts do require that a specific defendant be named in the EEOC charge. See Freeman v. Schultz, 468 F.2d 120 (D.C. Cir. 1972) (An oral complaint against an employer with the EEOC that only triggered an informal investigation is insufficient exhaustion of administrative remedies under Title VII.). Because plaintiff has never filed administrative charges against Abell with the EEOC, and thus never afforded Abell the opportunity to assert its defendants (sic) in the administrative forum, plaintiff's Title VII claims should be dismissed.

III.

Plaintiff also claims against Abell under 42 U.S.C. S 2000e-10, alleging that Abell failed to post a proper notice of the employees' rights under Title VII. S

2000e-10 provides:

(1) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts, from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(2) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

The issue here is whether a private cause of action for damages can be implied under this section. To determine whether a private case of action is implicit in a statute, several factors must be analyzed. First, plaintiff must be a member of the class for whose benefit the statute was enacted. Second, there must be a legislative intent to create such a remedy. Third, it must be consistent with the underlying purpose of the

statute to imply such a remedy for the plaintiff. Finally, it must be ascertained whether the cause of action is traditionally relegated to state law, or whether it would be appropriate to infer a cause of action based solely on federal law. See Cort v. Ash, 422 U.S. 66, 78 (1975). Here, although plaintiff is a member of the class for whom the statute was enacted, the legislative history indicates that the statute's purpose is to allow the EEOC to prepare or approve notices that set forth excerpts of the title, and to require employers and unions to post these notices in conspicuous places. An employer's or union's willful failure to comply results in fines. H.R. REP. NO. 914 88th Cong., 2nd Sess., reprinted in 1964 U.S. CODE CONG. & AD. NEWS, 2355, 2407. Thus, the purpose of the statute is only to provide the EEOC with

regulatory power (via fines) over the employers and the unions, rather than to create a private remedy for the employees. The Court simply cannot conceive, especially given the elaborate civil remedial provisions of the same subchapter of Title 42 of which S 2000e-10 is a part, that Congress ever intended a private right of action to arise from simple failure to post notices. None of the other factors in the Cort v. Ash analysis is persuasive otherwise. For this reason, plaintiff's claim under S 2000e-10 must be dismissed.

IV.

Plaintiff also alleges that Abell violated plaintiff's civil rights under 42 U.S.C. SS 1985, 1986, and 1981, respectively, by: (1) conspiring with the other named defendants to interfere with plaintiff's civil rights; (2) failing to prevent the other named defendants from

violating plaintiff's civil righs (sic) under S 1985, although allegedly Abell knew of these wrongs and had the power to stop them; and (3) denying plaintiff his right to equal benefits under the law.

However, plaintiff's claims under SS 1981, 1985, and 1986 must be dismissed because they are barred by the statute of limitations. The statute of limitations for an action under S 1981 is three (3) years. McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., No. 82-1179 (4th Cir. Jan. 17, 1983). The limitations period for actions under S 1986, as stated in the statute itself, is one (1) year. The statute of limitations for actions under S 1985 is three (3) years, with the cause of action accruing when the plaintiff knows or has reason to know of his injury: "It is the awareness of the facts giving rise to the cause of action, not the awareness that

the illegality of the action is conclusively provable that begins the running of the state of limitations." Lewis v. Clark, 534 F. Supp. 714, 716 (D.Md. 1982). Plaintiff was aware of a possible cause of action as early as August 30, 1978, when he filed a discrimination claim with the EEOC against defendants ITU, BTU-12, and Sun Chapel (Paper #1); however, plaintiff failed to assert his claim against Abell until almost five years later (January 20, 1983).

Plaintiff asserts, however, that he is entitled to a tolling of the statute of limitations under either the doctrine of fraudulent concealment or the doctrine of continuing violations. The doctrine of fraudulent concealment is set forth in Davis v. Edgemere Finance Co., 523 F. Supp. 1121 (D.Md. 1981). A statute of limitations is tolled when the defendant,

by fraudulent means, keeps the potential plaintiff in ignorance of the fact that plaintiff has a cause of action.

Plaintiff must prove:

> "(1) fraudulent concealment by the party raising the statute together with (2) the other party's failure to discover the facts which are the basis of his cause of action despite (3) the exercise of due diligence on his part." Since this means of avoiding the statute was created by courts of equity, we adopted their requirement that the facts necessary to show these elements should be distinctly pleaded .... In Stearns v. Page, 48 U.S. (7 How.) 818, 829, 12 L.Ed. 928 (1849), the Court explained the reasons for these essential elements as follows:
>
> "A complainant, [to avoid the statute of limitations,] must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment,--must specify how, when, and in what manner, it was perpetrated. The charges must be definite and reasonably certain, capable of proof, and clearly proved .... And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made."

Davis, 523 F. Supp. at 1125 (footnote omitted).

Plaintiff has alleged that Abell and the other named defendants "participated in involved, convoluted transactions" which resulted in the denial of plaintiff's civil rights; that the "complexity of occurrence were such that" plaintiff should not have been expected to "comprehend the nature of involvement of the various parties" and that plaintiff was unaware of potential remedies "because facts were concealed and transactions hidden"; plaintiff asserts that he has "actively pursued" all remedies to the best of his ability. These contentions are unsupported by any specific factual allegations, as required under the Davis test. The plaintiff's counsel was unable to articulate specific facts pertaining to the alleged fraudulent concealment at the October 12

hearing, other than to refer to Mr. Rajaram's speculations as to the existence of a conspiracy between Abell and the unions. This speculation is clearly insufficient under Davis.

Plaintiff asserts, also, that he was unable to discover Abell's involvement in these discriminatory transactions until November 1982, when fully advised by new counsel, and therefore was unable previously to obtain knowledge of his injury and the cause of his injury. Thus, he claims that the statute of limitations was tolled until November, 1982 under the standards set forth in United States v. Kubrick, 444 U.S. 111 (1979). In Kubrick, the plaintiff sued under the Federal Tort Claims Act for the VA's negligent administration of an antibiotic that caused a permanent hearing loss. Although plaintiff sought care for the hearing loss shortly after

the original treatment and was told that the medication could have caused his hearing impairment, it was not until three years later that he was advised by a physician that the medicine was negligently administered. It was then that plaintiff instituted suit. Although the Court recognized that a cause of action did not accrue until the plaintiff was aware of his injury and its cause, plaintiff did not have to be aware that the doctor's conduct was legally blameworthy before the cause of action accrued. The Court noted that it was "unconviced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment," Kubrick, 444 U.S. at 122, and it held that plaintiff's cause of action was barred by the two (2) year statute of

limitations.

In this case, plaintiff's reliance in Kubrick is misplaced. The rule in Kubrick has been held inapplicable outside of medical malpractice situations. See Wilkinson v. United States, 677 F.2d 998, 1002 (4th Cir.), cert. denied, 103 S.Ct. 209 (1982). Also, plaintiff has equated the "cause of injury" discussed in Kubrick with legal liability, rather than, as in Kubrick, connecting the cause of injury with a mechanical "but for" event. Mr. Rajaram was aware of his injury (abridgement of his civil rights) and the cause of his injury (the defendants' alleged failure to comply with seniority priorities, etc.) as early as August 30, 1978. The claim that he was ignorant of his legal right to sue Abell along with the other named defendants is not sufficient to toll the running of the statute of

limitations. As the Court noted in Kubrick, once the plaintiff is aware of his injury and the cause of his injury, the onus is upon him to seek professional advice; to hold otherwise would defeat one purpose of the statute of limitations of preventing stale claims from being raised. See Kubrick, 444 U.S. at 118.

Plaintiff further contends that he is entitled to a tolling of the statute of limitations under the doctrine of continuing violations. However, a "continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." Ocean Acres v. Dare Co. Board of Health, Nos. 82-1458, 82-1489 (4th Cir. May 12, 1983). Assuming, arguendo, that there was discrimination by Abell that constituted a series of acts during the employer-employee relationship, this would not allow plaintiff to sue Abell in

1983, because his employment with the company ended in 1978; plaintiff would have had to have sued within three (3) years of his discharge in order to invoke the continuing violations remedy. See Williams v. Norfolk & W. Ry. Co., 530 F.2d 539 (4th Cir. 1975). Because plaintiff has failed to show that he met the requirements under either the doctrine of fraudulent concealment or the doctrine of continuing violations, he is time-barred from raising his claims under 42 U.S.C. SS 1981, 1985, and 1986.

V.

Plaintiff has alleged that Abell breached a collective bargaining agreement, in violation of S 301 of the Taft Hartley Act, 29 U.S.C. S 185. This claim, however, must be dismissed because it is barred by the six (6) month statute of limitations applicable to S 301 breach of contract actions. DelCostello v.

International Brotherhood of Teamsters, 51 U.S.L.W. 4693 (1983).

VI.

Plaintiff further alleges that Abell engaged in unfair labor practices in violation of S 8(a) of the Taft-Hartley Act, 29 U.S.C. S 158(a), by its participation with the other named defendants in discriminatory hiring and tenure practices. This claim must be dismissed because this Court does not have subject matter jurisdiction. Section 8(a) claims are within the exclusive jurisdiction of the NLRB. While the District Court can have jurisdiction over a S 301 claim concurrent with the NLRB's jurisdiction over a S 8(a) claim, see Smith v. Evening News Association, 371 U.S. 195 (1962); Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders Assn., 646 F.2d 117 (4th Cir. 1981), a S 8(a) claim can

only be brought before the NLRB.

VII.

Finally, plaintiff has raised a state law contract claim against Abell, alleging that: "The plaintiff was not compensated for the years of service rendered." State law claims are appropriate for the Court's determination if they form a separate but parallel ground for relief sought in a substantial claim based on federal law. However, where, as here, the federal claims are insubstantial, the federal court should not assume jurisdiction over the state claim: "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Therefore, this state claim should also be dismissed.

VIII.

For the reasons stated above, I respectfully recommend that, upon the expiry of time allowed in Local Rule 82 and FED. R. CIV. P. 72 for taking exception hereto, an order be entered granting defendant Abell's motion to dismiss.

/s/
Frederic N. Smalkin
United States Magistrate

Dated: October 18th, 1983

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM (entered November) (10, 1983)

vs.

INTERNATIONAL TYPOGRAPHICAL UNION; and BALTIMORE TYPOGRAPHICAL UNION NO. 12; and SUNPAPERS CHAPEL OF BALTIMORE TYPOGRAPHICAL UNION NO. 12; and JACK POIST and GARY KIDWELL; A.S. ABELL PUBLISHING COMPANY

CIVIL NO,. B-80-0012

O R D E R

Upon consideration of the Magistrate's Report and Recommendation dated October 18, 1983, and upon the expiry of time allowed in Local Rule 82 and FED. R. CIV. P. 72 for taking exception hereto, IT IS, this 6th day of November, 1983, by the United States District Court for the District of Maryland ORDERED:

1. That the Magistrate's Report and

Recommendation BE, and the same hereby IS ADOPTED;

2. That Defendant Abell's motion to dismiss BE, and the same hereby IS, GRANTED; and

3. That the Clerk of Court mail copies of this Order to counsel for the parties.

/s/
Walter E. Black, Jr.
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM (entered February (28, 1984)

vs

INTERNATIONAL TYPOGRAPHICAL UNION, ET AL.

CIVIL NO. B 80-0012

MAGISTRATE'S REPORT AND RECOMMENDATION

I.

Plaintiff, Kondian R. Rajaram, a native of India and now a naturalized American citizen, is a member of the defendant Unions, viz., International Typographical Union (ITU), Baltimore Typographical Union No. 12 (BTU-12), and Sunpapers Chapel of Baltimore Typographical Union No 12 (Sun Chapel). As a Union member, he worked as a contract substitute employee for the A. S. Abell Publishing Company from August, 1974 until July, 1978, when substitute work was eliminated. In January, 1980, plaintiff filed a complaint in this

Court, alleging discriminatory actions on the part of the Unions and two officers of Sun Chapel, Jack Poist and Gary Kidwell.

The case is now before the Court on plaintiff's amended motion for summary judgment (Paper No. 122); the cross-motions for summary judgment filed by defendants BTU-12, Sun Chapel, Poist and Kidwell (Paper No. 124) and ITU (Paper No. 127); and the parties' supplemental memoranda. By previous order of Judge Black, dated July 27, 1982, the case was referred to me in accordance with Local Rule 80. The above-mentioned motions were heard on February 7, 1984. The plaintiff's claims, set forth in the amended complaint in 16 counts, arise under a constellation of jurisdictional bases., For eace of discussion, this Court has organized its analysis according to the jurisdictional bases for

plaintiff's various claims.

II.

Plaintiff alleges that all of the defendants violated his rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. S 2000e et seq. (1976, as amended) by:

1. Maintaining illegal provisions in the Union by-laws that

   a. abridged plaintiff's Title VII rights (Plaintiff's affidavit {1} paragraphs 11, 12, 13, 15, 17); and

   b. forced plaintiff to incur considerable personal expense in pursuing his internal Union remedies (Plaintiff's affidavit, paragraphs 29, 30);

2. Illegally by-passing plaintiff for a substitute position in November, 1976, in favor of a white worker with lower priority (Plaintiff's affidavit, paragraphs 8, 9);

3. Instituting an illegal "share the work" agreement in January and February, 1977, which caused plaintiff to lose employment opportunities (Plaintiff's affidavit paragraph 10);

4. Refusing to accept prepayment of plaintiff's Union dues in 1976

(Plaintiff's affidavit, paragraph 8); and

5. Eliminating, in December, 1976, the position for which plaintiff had first priority, in retaliation against plaintiff's complaints (Plaintiff's affidavit, paragraphs 9, 14, 18, 19, 20).

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{1} Plaintiff's affidavit is attached to Paper No. 122.

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With respect to plaintiff's first claim, concerning illegal provisions in the Union by-laws, this Court is of the opinion that the Title VII action is barred because plaintiff is bound by the consent agreement entered into among the EEOC, ITU, and Sun Chapel. (Paper No. 127, Ex. 4). Plaintiff originally raised this charge with the EEOC in August, 1978. (Paper No. 127, Exs. 7, 8). The EEOC, determining that there was reasonable cause to believe that the by-laws violated plaintiff's Title VII

rights, invited the parties to conciliate. When that effort failed, the EEOC instituted suit in this Court against ITU and Sun Chapel and invited plaintiff to intervene, pursuant to 42 U.S.C. S 2000e-5(f)(1). (Paper No. 127, Ex. 2). Plaintiff refused to do so. Subsequently, ITU and Sun Chapel entered into a consent agreement with the EEOC in which the Unions agreed to amend their by-laws, publish these amendments, and forbear from retaliatory discrimination against any complaining worker. (Paper No. 127, Ex. 4). EEOC v. Sunpaper Chapel of BTU-12, et al., No. JH-79-1286 (sic) (D.Md. June 18, 1980). No provision was made in this consent agreement to compensate plaintiff for the considerable personal expense incurred in pursuing his Union remedies under the illegal by-laws.

Because plaintiff was not a party to the consent agreement, he now argues that

he is not bound by it and can recover compensation from the Unions. Under the statutory scheme of 42 U.S.C. S 2000e-5(f)(1), a charging party has an unqualified right to intervene in the EEOC's lawsuit. If he wishes to participate in or reject any settlement negotiated by the EEOC, he may protect himself by intervening. However, the Fourth Circuit has decided that, under the statutory language of S 2000e-5(f)(1), if a charging party chooses not to intervene, then he will be held to have placed the conduct of the litigation entirely in the hands of the EEOC and to have expressed a conclusive willingness to be bound by the outcome. Adams v. Proctor & Gamble Mfg. Co., 697 F.2d 582, 583 (4th Cir. 1983). In the instant case, plaintiff undoubtedly wishes, with hindsight, that he had intervened in the EEOC action and pursued recovery of his

expenses in that manner. But, as the holding in Adams v. Proctor & Gamble Mfg. Co. makes clear, plaintiff cannot now litigate the matter before this Court, because he is bound by the consent decree, and because the EEOC simply has no statutory authority to issue a right-to-sue letter to a non-intervenor, once the EEOC has, itself, commenced litigation.

However, contrary to defendant ITU's assertions, plaintiff's second, third, and fourth claims are not barred by the prior consent agreement. Although plaintiff filed these three charges with the EEOC in August, 1978, they were dismissed by the Commission on the merits in November, 1978 (see paper No. 127, Ex. 8), and plaintiff was issued a right-to-sue letter nearly one year later, in October, 1979. (Paper No. 1, Ex. 3). As long as the suit is brought timely, as

was the case here, a charging party may institute a court action despite the fact that the EEOC previously determined that the charges were without merit and therefore made no attempt to secure voluntary compliance. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973). Adams v. Proctor & Gamble Mfg. Co. does not bar the suit, because the pendency of EEOC litigation does not deprive that agency of statutory authority to issue right-to-sue letters with regard to dismissed claims.

On the merits of the second and third claims, concerning the job by-pass and "share the work" agreement, plaintiff alleges that defendants' actions resulted in disparate treatment of plaintiff. He asserts that the defendants were motivated by a discriminatory attitude toward his national origin and the desire to retaliate against him for his

complaints against the Unions. To establish a prima facie case of disparate treatment under Title VII, plaintiff must show that he was treated less favorably than others in the same situation because of his race, color, religion, sex, or, as is alleged in this case, national origin. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); see also McDonnell Douglas Corp. v. Green, 411 U.S. at 802. A prima facie case of disparate treatment could also be made by showing that the defendants retaliated against plaintiff for the latter's complaints to the Union. See Avon v. Sampson, 547 F.2d 446, 449 (9th Cir. 1976; 42 U.S.C. S 2000e-3(a). Proof of discriminatory motive on the defendant's part is critical, although in some situations it can be inferred from the mere fact of differences in treatment. International Brotherhood of

Teamsters v. United States, 431 U.S. at 335 n.15. Once the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant "to articulate some legitimate, non-discriminatory reason for the employee's rejection." McDonnell Douglas Corp. v. Green, 411 U.S. at 802. Defendant must show a non-discriminatory reason, but does not have to show that it was actually motivated by this proffered reason. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The burden then reshifts to the plaintiff to show that defendant's proffered reason is pretextual only, and that defendant was actually motivated by a discriminatory animus. Id., 450 U.S. at 256.

In the instant case, this Court is of the opinion that plaintiff has presented triable issues on his second

and third claims concerning the job by-pass and "share the work" agreement. With regard to the second claim, plaintiff has shown--and defendants do not dispute--that he was first in priority for a substitute position that was awarded to a white (American) worker with less seniority. Defendants have asserted a non-discriminatory justification--they assumed plaintiff was uninterested in day work, based on his prior preferences, and they therefore gave the job to the highest priority worker who requested day work (see Keys [sic] affidavit attached to Paper No. 124, paragraph 7)--that plaintiff has challenged as a pretextual. This raises a genuine dispute as to material fact that, under FED.R.CIV.P. 56, requires denial of the parties' motions for summary judgment on this issue. See Cole v. Cole, 633 F.2d 1083, 1092 (4th Cir.

1980).

Similarly, with regard to his third Title VII claim, plaintiff has shown that the "share the work" agreement--voted on only by the days substitutes, not all of the substitutes--had an adverse impact on the workers with the most seniority, including plaintiff, who was senior proofreader. Of particular importance is plaintiff's allegation--not answered by defendants--that plaintiff was not notified of the voting date and thus not afforded an opportunity to participate in the formation of this agreement. Defendants have asserted a non-discriminatory justification for the agreement--a desire to provide an opportunity for all substitutes to work as often as possible--that plaintiff has labeled as pretextual. This again raises a genuine dispute as to material fact under FED.R.CIV.P. 56, which must heard

at trial.

However, this Court is of the opinion that plaintiff's fourth claim, concerning the prepayment of his Union dues, fails to establish a prima facie case of disparate treatment. By plaintiff's own admission, his request to prepay his Union dues was in fact accepted--albeit after "strenuous insistence." The matter is simply damnum sine injuria. (Plaintiff's affidavit, paragraph 8).

Plaintiff's final Title VII claim, that his civil rights were violated by the retaliatory elimination of substitute positions in December, 1976, is barred because plaintiff failed to exhaust his administrative remedies regarding that claim with the EEOC, as required under 42 U.S.C. S 2000e-5. That statute contains strict requirements that plaintiff file a charge with the EEOC, receive a right-to-

sue letter, and act upon that letter timely. These requirements can only be relaxed when the plaintiff's failure to follow this procedure is due to misleading acts by the EEOC, an employer, or a union--none of which is alleged in plaintiff's affidavit. Plaintiff's failure to file a claim with the EEOC thus bars his Title VII suit on this issue. Bickley v. University of Maryland, 527 F. Supp. 174, 177 (D.Md. 1981).

Therefore, for the reasons stated above, the parties' motions for summary judgment on the Title VII claims should be denied in part and granted in part, as indicated in the aforegoing discussion. Specifically, summary judgment should be granted for defendants as to Counts (sic) I, and part of Count VI {2} of the amended complaint, and otherwise denied for all parties on Counts V, VI (in part), and

XVI.

III.

Plaintiff also alleges a Title VII claim against BTU-12 and Sun Chapel, pursuant to 42 U.S.C. S 2000e-10, based on the

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{2} An enumeration of the Counts in plaintiff's amended complaint and recommended dispositions of the pending motions with reference thereto are contained in Appendix I.

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Unions' alleged failure to post notices regarding grievance procedures available to Union members. (Plaintiff's affidavit, paragraph 17). However, as was noted in the Magistrate's Report and Recommendation of October 18, 1983 (Paper No. 107), which was adopted by the Court on November 10, 1983 (Paper No. 113), no private cause of action for damages can be implied under this section. Therefore, plaintiff's motion for summary

judgment under S 2000e-10 should be denied, and defendants' cross-motion should be granted, as to Count VII of plaintiff's amended complaint.

IV.

Plaintiff further alleges that all of the defendants violated his right to equal treatment under the law, pursuant to 42 U.S.C. S 1981, by:

1. Refusing to accept advance payment of plaintiff's Union dues in 1976;

2. Illegally by-passing plaintiff for a substitute position in November, 1976 (Plaintiff's affidavit, paragraphs 8, 9);

3. Retaliating against plaintiff in December, 1976 for his complaints by eliminating the job for which plaintiff had first priority (Plaintiff's affidavit, paragraphs 9, 14, 18, 19, 20); and

4. Forcing plaintiff to participate in an illegal "share the work" agreement during January and February, 1977 (Plaintiff's affidavit, paragraph 10).

Plaintiff's first three claims, involving the dues payment dispute, job

by-pass, and subsequent elimination of substitute positions, occurred in 1976. These three claims are therefore barred by the statute of limitations, which is three years for claims brought under Section 1981. McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., 698 F.2d 676, 679 (4th Cir. 1983). These are discrete claims, arising from discrete incidents, and are not continuous in force or effect. Thus, they are time-barred.

Turning to the merits of plaintiff's fourth claim under Section 1981, which is not barred by the statute of limitations, plaintiff must first show that there was discrimination against him on account of race. This rule is grounded in the constitutional and legislative history of Section 1981, which was enacted to enforce the scope of the Thirteenth Amendment. Congress was clearly given

the power "to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968). Thus, discrimination based on sex, religion, or national origin is not actionable under Section 1981. See Patel v. Holley House Hotels, 483 F. Supp. 374, 383 (S.D.Ala. 1979); Woods v. New York, 469 F. Supp. 1127 (S.D.N.Y.), aff'd., 614 F.2d 1293 (2d Cir. 1979); National Association of Government Employees v. Rumfeld, 413 F. Supp. 1224 (D.D.C. 1976), aff'd., 556 F.2d 76 (D.C. Cir. 1977). Second, plaintiff must show a "purposeful" intent to discriminate on the defendant's part. General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375, 389 (1982). Third, plaintiff must show that the discriminatory action occurred in

connection with an activity enumerated in Section 1981--in this case, the enforcement of an employment contract. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). In the instant case, plaintiff's claim under Section 1981 is not actionable; by plaintiff's own concession, made by his counsel at the hearing held on February 7, 1984, plaintiff's claims in this case are based on discrimination on account of national origin, and, perhaps, skin tone, but not race.

Therefore, plaintiff's motion for summary judgment on all of his Section 1981 claims should be denied, and defendants' cross-motions granted, as to Count IV of plaintiff's amended complaint.

V.

Plaintiff asserts that all of the named defendants violated his civil

rights under 42 U.S.C. S 1985(3) by concurring in an agreement to end his employment in December, 1976, in retaliation for his complaints. (Plaintiff's affidavit, paragraph 14). The statute of limitations for actions under Section 1985 is three years, with the cause of action occruing when the plaintiff knows or has reason to know of his injury. Lewis v. Clark, 534 F. Supp. 714, 716 (D.Md. 1982). Arguably, plaintiff was aware of a cause of action in December 1976, when the substitute positions were abolished. If so, his Section 1985(3) actions is barred by the statute of limitations.

However, even if plaintiff were unaware of a possible cause of action until August, 1978, when he filed charges with the EEOC, plaintiff must still prove that there was: (1) a conspiracy, (2) to deprive him of equal protection of the

laws, (3) with an overt act by one of the conspirators in furtherance of the conspiracy, (4) resulting in injury to plaintiff or his property or the deprivation of one of his rights or privileges. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971). In addition, there must be some racial or other class-based discriminatory animus behind the conspirators' actions. Id., 403 U.S. at 102 n.10; Hughes v. Ranger Fuel Corp., Division of Pittston Co., 467 F.2d 6, 10 (4th Cir. 1972). In the instant case, plaintiff has made no allegations to prove the existence of a conspiracy, beyond his conclusory assertions that the defendants "consulted" and "concurred in an agreement" to deprive him of his civil rights. Pleading conspiracy under Section 1985(3) requires at least minimum factual support of the existence of a conspiracy. In the absence of such

specific allegations, and in the presence only of conjecture (even when asserted under oath), this claim cannot stand. See Yarbrough v. Illinois Dept. of Mental Health, 538 F. Supp. 414, 416 (D.Ill., 1982).

Plaintiff also contends that his rights under 42 U.S.C. S 1986 were violated by the fact that "[n]one of the defending parties prevented, helped to prevent nor tried to prevent violations mentioned in [plaintiff's] Complaint [pursuant to S 1985(3)], about which they had been notified." (Plaintiff's affidavit, paragraph 16). However, the statute of limitations for actions under Section 1986, as stated in the statute itself, is one year; therefore, plaintiff's claims under Section 1986 cannot now be raised, since he failed to file suit until January 4, 1980. Thus plaintiff's motion for summary judgment

on his Section 1985(3) and 1986 claims should be denied, and defendants' cross-motions granted, as to Counts II and III, respectively, of plaintiff's amended complaint.

VI.

Plaintiff claims that the defendant Unions breached the collective bargaining agreement and duty of fair representation, in violation of Section 301 of the Taft-Hartley Act, 29 U.S.C. S 185(a), by:

1. By-passing plaintiff for a substitute position in November, 1976, for which he was first in priority (Plaintiff's affidavit, paragraphs 8, 9);

2. Eliminating all substitute jobs in December, 1976 (Plaintiff's affidavit, paragraphs 9, 14, 18, 19, 20);

3. Participating in the illegal "share the work" agreement in January and February, 1977 (Plaintiff's affidavit, paragraph 10);

4. Negotiating in bad faith with the employer in 1978, thus allowing the permanent elimination of all substitute positions (Plaintiff's

affidavit, paragraphs 14, 21, 22, 25); and

5. Forcing plaintiff to accept the buy-out payment, following the elimination of the substitute positions. (Plaintiff's affidavit, paragraphs 22, 23).

All of these claims, however, are barred by the six-month statute of limitations applicable to Section 301 causes of action. DelCostello v. International Brotherhood of Teamsters, ___ U.S. ___, 103 S.Ct. 2281 (1983). Plaintiff urges this Court not to apply the DelCostello rule retroactively in this case, because of the equities allegedly involved. However, the Fourth Circuit has clearly stated that the six-month limitations rule established in DelCostello for violations of contract/breach of duty of fair representation cases should be applied retroactively. Murray v. Branch Motor Express Co., No. 82-1202 (4th Cir. Dec.

20, 1983). The rule in Murray is, in this Court's judgment, unaffected by the equities of the particular case. Therefore, plaintiff's motion for summary judgment under Section 301 should be denied, and defendants' cross-motions should be granted, as to Count VIII of plaintiff's amended complaint.

VII.

Plaintiff further alleges that the defendants violated his rights under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. S 401 et seq., by punishing him for objecting to Union practices. In particular, plaintiff asserts that defendants violated his rights by:

1. Refusing to accept advance payment of his Union dues in 1976, in violation of Section 411(a)(1) (Plaintiff's affidavit, paragraph 8);

2. By-passing plaintiff for a substitute position for which he had first priority, in violation of Section 411(a)(1) and (2) (Plaintiff's

affidavit, paragraphs 8, 9);

3. Failing to notify the Union members concerning the provisions of the LMRDA, in violation of Section 415;

4. Maintaining an illegal clause in the Union by-laws, thereby forcing plaintiff to pursue internal Union remedies that exceeded the four-month statutory limit, in violation of Section 411(a)(4) (Plaintiff's affidavit, paragraphs 11, 12, 13, 14, 17);

5. Participating in the "share the work" agreement for two months in 1977, in violation of plaintiff's voting rights contained in Section 411(a)(1) (Plaintiff's affidavit, paragraph 10);

6. Eliminating all substitute positions in July, 1978, and subsequently failing to seek work for plaintiff, in violation of Section 411(a)(5) (Plaintiff's affidavit, paragraphs 9, 14, 18, 19, 20);

7. Disciplining plaintiff by all of the above actions without providing him wih (sic) formal charges, a reasonable time in which to prepare a defense, or a full and fair hearing, in violation of Sections 411(a)(5) and 529.

This Court is of the opinion that the first two claims, involving the dues dispute and job by-pass, are barred by

the statute of limitations. The LMRDA does not contain an express statute of limitations, so the courts must look to the most analogous state statute of limitations. Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704 (1966); See Berard v. General Motors Corp., 493 F. Supp. 1035, 1043 (D.Mass.), aff'd., 657 F.2d 261 (1st Cir. 1980), cert. denied, 451 U.S. 987 (1981). Under Maryland law, a civil action must be filed within three years of its date of accrual, unless otherwise specified by statute. MD. CTS. & JUD. PROC. CODE ANN. S 5-101 (1980 Repl. Vol.). Because the Maryland statute does not specifically provide for any cause of action analogous to the LMRDA, Section 5-101 controls. Both of plaintiff's claims arose in 1976, but he did not file this action until January 1980; therefore, these claims are time-barred.

In addition, plaintiff's third claim, concerning the failure of the Union officials to notify the members of LMRDA provisions, is simply not meritorious. A prerequisite to recovery under Section 415 is that a member ask the officers to inform the membership of the LMRDA provisions; the duty is not self-actualizing. See Broomer v. Schultz, 239 F. Supp. 699, 705 (E.D.Pa. 1965), aff'd., 356 F.2d 984 (3d Cir. 1966). In addition, if that request is denied, the complaining member must first exhaust his internal Union remedies. Wiglesworth v. Teamsters Local Union No. 592, 552 F.2d 1027, 1031 (4th Cir. 1976), cert. denied, 431 U.S. 955 (1971). In the instant case, plaintiff has presented no evidence, by affidavit or otherwise, to indicate that he requested disclosure of the LMRDA provisions by the Unions or that he raised this issue with the Unions

through his various grievances. Therefore, his Section 415 claim is not actionable.

However, plaintiff's fourth claim, that the Union by-law provisions regarding grievance procedures violated his rights under Section 411(a)(4), is actionable. The statute clearly states that unions may not require exhaustion of remedies if exhaustion requires more than four months to complete. Under the Union grievance procedures with which plaintiff was forced to comply (on penalty of losing his Union membership), final internal appeal had to be made to ITU at its annual convention. Only if a Union member filed his claim within the four months immediately prior to the annual convention could the Union by-laws comply with Section 411(a)(4). A simple look at the calendar demonstrates that such fortuitous filing would rarely occur. In

fact, in plaintiff's case, he was forced to exshaust internal Union remedies over a fifteen month period (from June, 1977 through August, 1978). See Plaintiff's affidavit, paragraph 10 and Paper No. 129, Exs. 7(a)-7(m). Defendants argue that no private right of action is implied in Section 411(a)(4). However, the language of Section 411(a)(4), read in combination with Section 412, clearly provides for the right to bring a civil action in a federal district court. See Eisman v. Baltimore Regional Joint Board of Amalgamated Clothing Workers of America, 352 F.Supp. 429, 434 (D.Md. 1972), aff'd., 496 F.2d 1313 (4th Cir. 1974); Parks v. International Brotherhood of Electrical Workers, 314 F.2d 886, 925 (4th Cir. 1963).

Also, plaintiff's fifth claim, concerning the abridgement of his voting rights, is actionable under Section

411(a)(1). Every member of a labor organization has equal rights and privileges to participate in the deliberations and voting on union business, subject to reasonable rules and regulations in the union's by-laws and constitution. In the instant case, plaintiff alleges that he was not given an opportunity to vote on the "share the work" agreement, a claim that defendants do not dispute; at the hearing held on February 7, 1984, counsel for BTU-12, et al. conceded plaintiff's contention that only day substitutes voted on this agreement. The reason for the plaintiff's non-voting is still in dispute. Although the phrase "equal right to vote" in Section 411(a)(1) is not self-defining, if a particular Union member is prohibited from casting his ballot entirely, it is a patent denial of his equal right to vote. See Black v.

Transport Workers Union of America, AFL-CIO, 454 F. Supp. 813, 821 (S.D.N.Y.), aff'd., 594 F.2d 851 (1st Cir. 1978). Here, there is a genuine issue of material fact with regard to why plaintiff did not vote on this agreement.

In plaintiff's sixth and seventh claims, he alleges that the Unions employed improper disciplinary procedures against him, in violation of Sections 411(a)(5) and 529. "Discipline," as used in these sections, refers to retaliatory actions that affect a union member's rights or status within the union. Finnegan v. Leu, 456 U.S. 431, 437 (1982). Plaintiff asserts that the elimination of the substitute positions in December, 1976, was in retaliation against his complaints filed with the Union. However, plaintiff has failed to allege any facts that would tend to indicate retaliation on the Unions' part.

The first collective bargaining agreement ended in December, 1976. Although the employer, A. S. Abell, agreed to continue the terms of that collective bargaining agreement until a new contract was ratified, it refused to recognize the expired collective bargaining agreement provisions concerning substitute work positions; counsel for BTU-12, et al., indicated at the hearing that this refusal affected eight substitute positions. The Union challenged the employer's decision, and, under an arbitration award, it won a lump sum settlement of approximately $1,500 for each substitute worker involved. There is no indication that plaintiff was not informed of these developments, and he concedes that he accepted the lump-sum award. The adequacy vel non of the award is immaterial here. In light of the fact that there is no evidence from plaintiff

to show that the loss of substitute work was based on a retaliatory motive, his sixth and seventh claims are not actionable. Therefore, as indicated above, summary judgment should be granted for defendants as to Counts X (in part), XII, XIII and XIV of plaintiff's amended complaint, and otherwise denied for all parties as to Counts X (in part) and XI.

VIII.

In plaintiff's final claim, he alleges that the defendants breached their fiduciary duty by failing to obtain permanent or continuing substitute employment for plaintiff after the termination of the December, 1976 collective bargaining agreement. In addition, plaintiff seeks compensation for his years of service to the Union, under the theories that (1) his work as a substitute provided a service to the Union by protecting permanent job-

holders' positions, and (2) his grievance, which led to the elimination of illegal by-law provisions, protected the other Union members. These claims are predicated on a quasi-contract theory, based on the equitable doctrines of unjust enrichment and quantum meruit, and are asserted under the rubric of pendent jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

In order to establish a claim based on quasi-contract, it must be shown that: (1) a benefit was conferred on the defendants by plaintiff; (2) defendants appreciated or knew of the benefit; and (3) the acceptance or retention of the benefit by defendants, without payment for its value, would be inequitable. Everhart v. Miles, 47 Md. App. 131, 422 A.2d 28, 31 (1980). In the instant case, plaintiff did not confer any benefit upon defendants that was not contemplated in

the written contract. He was hired as a proofreader substitute and compensated for the hours that he worked. Also, despite plaintiff's contention that he was promised rights not contained in his contract--specifically, permanent employment--there is simply no sufficient showing of facts to generate a triable issue on any quantum meruit theory. Plaintiff paid his union dues, which is the only "benefit" he conferred on the Unions. In turn, they did what they agreed to do by express contract. There simply has been no "unjust enrichment" of the Unions attributable to anything Mr. Rajaram did for them. The plaintiff's theory is novel, but too ethereal to support a cause of action.

For these reasons, plaintiff's motion for summary judgment on this claim should be denied and defendants' motions granted, as to Counts IX and XV of

plaintiff's amended complaint.

IX.

For the reasons stated herein, I respectfully recommend that, upon the expiry of time allowed in Local Rule 82 and FED. R. CIV. P. 72 for taking exception hereto, an order be entered denying in part and granting in part the parties' motions for summary judgment, as enumerated in Appendix I.

/s/
Frederic N. Smalkin
United States Magistrate

Dated: February 27th, 1984

APPENDIX I

| Count | Jurisdiction | Recommended Disposition | R/R Text Ref. (Part) |
|---|---|---|---|
| I. Union by-laws in violation of Title VII | Title VII, 42 U.S.C. S 2000e-2 | Plaintiff's motion denied; Defendants' motions granted. No trial Necessary. | II |

| | | | |
|---|---|---|---|
| II. Conspiracy to deprive plaintiff of his right to equal protection of the law | 42 U.S.C. S 1985(3) | Plaintiff's motion denied; Defendants' motions granted. No trial necessary. | V |
| III. Failure to prevent S 1985 violations | 42 U.S.C. S 1986 | Plaintiff's motion denied: Defendants' motions granted. No trial necessary | V |
| IV. Deprivation of plaintiff's right to equal protection of the law | 42 U.S.C. S 1981 | Plaintiff's motion denied; Defendants' motions granted. No trial necessary. | IV |
| V. By-pass of plaintiff for employment due to his national origin | Title VII, 42 U.S.C. S 2000e-2 | All parties' motions denied. Trial necessary | II |
| VI. Discrimina- | Title VII, 42 U.S.C. | | |

| | | | |
|---|---|---|---|
| tion against plaintiff for his opposition to the Defendants' employment practices | S 2000e-3<br>1. job by-pass | All parties' motions denied. Trial necessary. | II |
| | 2. "share the work" agreement | All parties' motions denied. Trial necessary. | II |
| | 3. dues payment dispute | Plaintiff's motion denied. Defendants' motions granted. No trial necessary. | II |
| | 4. Elimination of substitute jobs | Plaintiff's motion denied. Defendants' motions granted. No trial necessary. | II |
| VII. Failure to post provisions of Civil Rights Act | Title VII, 42 U.S.C. S 2000e-10 | Plaintiff's motion denied. Defendants' motions granted. No trial necessary. | III |

| | | | |
|---|---|---|---|
| VIII. Breach of Contract; Breach of Duty of Fair Representation | S 301 of the Taft-Hartley Act, 29 U.S.C. S 185(a) | Plaintiff's motion denied; Defendants' motions granted. No trial necessary. | VI |
| IX. Breach of the Fiduciary Duty to plaintiff | Common Law Quasi Contract | Plaintiff's motion denied; Defendants' motions granted. No trial necessary. | VIII |
| X. Punishment of plaintiff for his objections to employment practices | LMRDA, 29 U.S.C. S 411(a) (1) & (2) | | |
| | 1. Abridgement of plaintiff's voting rights on the "share the work" agreement | All parties' motions denied. Trial necessary. | VII |
| | 2. elimination of substitute jobs | Plaintiff's motion denied; Defendants' motions granted. | VII |

| | | | |
|---|---|---|---|
| | | No trial necessary. | |
| | 3. job by-pass | Plaintiff's motion denied; Defendants' motions granted. No trial necessary. | VII |
| | 4. dues payment dispute | Plaintiff's motion denied; Defendants' motions granted. No trial necessary. | VII |
| XI. Illegal provisions in Union by-laws | LMRDA, 29 U.S.C. S 411(a)(4) | All parties' motions denied. Trial necessary. | VII |
| XII. Improper discipline procedures against plaintiff | LMRDA, 29 U.S.C. S 411(a)(5) | Plaintiff's motion denied; Defendants' motions granted. No trial necessary. | VII |
| XIII. Failure to post provisions of LMRDA | LMRDA, 29 U.S.C. S 415 | Plaintiff's motion denied; Defendants' motions | VII |

| | | | |
|---|---|---|---|
| | | granted. No trial necessary. | |
| XIV. Improper disciplining of plaintiff | LMRDA, 29 U.S.C. S 529 | Plaintiff's motion denied; Defendants' motions granted. No trial necessary. | VII |
| XV. Failure to compensate plaintiff for services rendered | Common Law Quasi-Contract | Plaintiff's motion denied; Defendants' motions granted. No trial necessary. | VIII |
| XVI. Employment Discrimination by arbitrary classification of substitute workers | Title VII, 42 U.S.C. S 2000e-2 | | |
| | 1. job by-pass | All parties' motions denied. Trial necessary. | II |
| | 2. "share the work" agreement | All parties' motions denied. Trial necessary. | II |

UNITED STATES DISTRICT COURT
208 U.S. COURTHOUSE
101 W. LOMBARD STREET
BALTIMORE, MD 21201-2691
FREDERIC N. SMALKIN
UNITED STATES MAGISTRATE
TELE: (301) 962-3840
FTS TEL: 922-3840

March 20, 1984 (entered March 22, 1984)

Edward J. Makowski, Esquire
1746 Eastern Avenue
Baltimore, MD 21231

Re: Rajaram v. ITU, et al.
Civil No. B 80-0012

Dear Mr. Makowski

I have received and reviewed your request for reconsideration of my Report and Recommendation of February 27, 1984. Although, in large measure, your request simply restates arguments that I fully considered, yet rejected, there are several points you raised that should

specifically be addressed, in the interests of throughness.

First, in Part II of my Report and Recommendation, I determined that plaintiff's Title VII claim concerning illegal provisions in the Union by-laws was barred because plaintiff is bound by the consent agreement among the EEOC, ITU, and Sun Chapel. Adams v. Proctor & Gamble Mfg. Co., 697 D.2d 582 (4th Cir. 1983) holds that if a charging party chooses not to intervene in an EEOC action, then he will be held to have placed the conduct of the litigation entirely in the hands of the EEOC and to have expressed a conclusive willingness to be bound by the outcome. 697 F.2d at 583. The statutory scheme requiring both exhaustion and the vigorous pursuit of rights at the administrative level is meant to encourage active efforts, by all parties involved, to settle the dispute

at the administrative level. Plaintiff's actual intent and personal opinions regarding the lack of efficacy of the EEOC procedures and the "weakness of the Commission" cannot be used to circumvent this statutory scheme. Adams clearly places an onus on the charging party to pursue his claim vigorously and to guard his rights at all levels, not simply in the forum that he chooses. For this reason, plaintiff is clearly bound by the consent decree as to the defendants ITU and Sun Chapel.

However, as you correctly note, defendants BTU-12, Poist, and Kidwell were not parties to the consent agreement. This fact has, though, no determinative effect. The Title VII claim concerning the Union by-law provisions cannot be asserted here because plaintiff failed to exhaust his administrative remedies with the EEOC

pursuant to 42 U.S.C. Section 2000e-5. Plaintiff's charge with the EEOC named, as discriminating parties, only Sun Chapel and ITU; he never filed a charge against BTU-12, Poist, or Kidwell. It is true that the courts do not hold EEOC charges



to the tests of common law pleadings, in that the EEOC can expand the charges made against a specific defendant based on its investigation. EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976). However, the courts do require that a specific defendant be named in the EEOC charge. See Freeman v. Schultz, 468 F.2d 120 (D.C. Cir. 1972). Because plaintiff never filed administrative charges against BTU-12, Poist, and Kidwell with the EEOC, and thus never afforded them an opportunity to assert their defenses in

the administrative forum, plaintiff's Title VII claim concerning the Union by-law provisions is not now actionable in this forum.

Second, in Part II of my Report and Recommendation, I determined that plaintiff's Title VII claim concerning the retaliatory elimination of substitute positions was barred because plaintiff failed to exhaust his administrative remedies. Plaintiff seeks to avoid the exhaustion requirement, alleging that his failure to follow the statutory procedures was due to misleading acts by the Union (BTU-12), i.e., publishing a story in its bulletin stating that the matter had been settled by arbitration and that awards would soon be made. Contrary to plaintiff's allegations, however, this statement by the Union was not misleading; when made, it was true. When A.S. Abell decided not to recognize

the substitute positions after the collective bargaining agreement ended in December, 1976 (in apparent disregard of an oral agreement to continue the terms and conditions of employment until a new contract was finalized), the Union filed for and won arbitration on this issue; the affected employees were to be paid the difference between what they earned and what they would have earned had they been permitted to retain their temporary situations up to January 1, 1977. (Keys [sic] Affidavit, p. 6.). After this award the newspaper refused to reinstate the temporary situations. Despite grievances and a charge filed with the NLRB, the Union could not enforce compliance with the arbitration awards, and the NLRB refused to issue a complaint and dismissed the charge because there was no arbitration clause in the contract. Id. Because there was no

misleading act on the part of the defendants, plaintiff cannot avoid the exhaustion requirements of Title VII, and thus his "retaliatory elimination of substitute positions" claim is not actionable.

Third, in Part V of my Report and Recommendation, I determined that plaintiff's claims under 42 U.S.C. Sections 1985 and 1986 were not actionable. First to clarify a fact discussed in my



Report and Recommendation, you are correct in noting that, although substitute positions were not officially recognized by A.S. Abell after December, 1976, substitutes continued to work after that month, and the substitute positions were not formally abolished until the adoption of the July, 1978 collective

bargaining agreement. Second, my analysis of plaintiff's Section 1985 claim was inadvertently limited to allegations concerning the end of substitute work. Conceivably, plaintiff could also raise this claim with respect to the job by-pass, "share the work" agreement, and illegal provisions in the Union by-laws. However, regardless of the factual bases of plaintiff's Section 1985 claim, there is a threshold requirement that a conspiracy existed, and there must be at least minimal factual support for the existence of a conspiracy. In the absence of specific allegations this claim cannot stand. See Yarbrough v. Illinois Department of Mental Health, 538 F. Supp. 414, 416 (D. Ill. 1982). Plaintiff's conclusory asseverations that the defendants "consulted" and "concurred in an agreement" and that they each failed to

advise plaintiff of his grievance rights (beyond the Union grievance procedures) are simply insufficient factual bases to support the allegation of a conspiracy.

In addition, under the explicit terms of Section 1986, if there is no Section 1985 claim, there cannot be a claim under Section 1986. Therefore, my prior decision concerning plaintiff's Section 1986 claim is also unchanged.

Fourth, in Part VII of my Report and Recommendation, I determined that your claims under the LMRDA, 29 U.S.C. Sections 411(a)(5) and 529, concerning allegations that the Unions employed improper disciplinary procedures against plaintiff, were not actionable. As a factual clarification, you are correct in noting that plaintiff did not limit the basis of his complaint to the elimination of substitute positions. Plaintiff also asserts that he was illegally disciplined

by the job by-pass, "share the work" agreement, and the Unions' continued failure to seek work for him after the adoption of the July, 1978 collectiver bargaining agreement. As was noted in my Report and Recommendation, at p. 15, all claims stemming from incidents in 1976 are barred by the three year statute of limitations. With respect to the post-1976 claims, "discipline" as a term of art refers to retaliatory actions that affect a union member's rights or status within the union. Finnegan v. Leu, 456 U.S. 431, 437 (1982). Plaintiff has not alleged any facts in support of his contention that the defendants' actions were



retaliatory in nature. The "share the work" agreement may have been implemented contrary to the Unions' standard

operating procedures, but there is no evidence to show that the agreement was a retaliatory act aimed at the plaintiff. Similarly, plaintiff may feel it unfair that he trained for four years for a job that was eliminated with the end of the 1976 collective bargaining agreement. However, the evidence indicates that, rather than attempting to retaliate against the plaintiff, the Union tried to preserve all of the workers' rights as they existed under the expired collective bargaining agreement. (See Keys [sic] affidavit, pp. 6-8). You correctly note that the $1,500 received by plaintiff did not represent payment under the arbitration award (as I had mistakenly referred to it in my Report and Recommendation, at p. 19), but rather was a severance payment for the substitutes whose job were eliminated by the July, 1978 collective bargaining agreement.

However, it is still a fact that the Union negotiated this payment for the substitutes--including the plaintiff--and that plaintiff accepted this money. Thus, my conclusion remains unchanged, i.e., that there is no evidence to show that the loss of substitute work was the result of any retaliatory act by the Union against the plaintiff.

In summation, I have amended my factual findings as provided herein. However, the recommended dispositions, as set forth in my Report and Recommendation, remain the same. With respect to the remaining contentions raised in your recent filing, but not expressly treated above, there is, in my judgment, no merit in your position, for the reasons discussed adequately in my Report and Recommendation. I understand that you intend to file additional material for Judge Black's consideration,

and that he will prescribe the schedule to govern such filing. A copy of this letter will be filed in the official court file, and will serve to supplmeent (sic) my Report and Recommendation of February 27, 1984.

Very truly yours,

/s/
Frederic N. Smalkin

FNS/skp

cc Honorable Walter E. Black, Jr.
Bernard W. Rubenstein, Esquire
Ronald Rosenberg, Esquire
Court File

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UNITED STATES DISTRICT COURT
208 U.S. COURTHOUSE
101 W. LOMBARD STREET
BALTIMORE, MD 21201-2691
FREDERIC N. SMALKIN
UNITED STATES MAGISTRATE
TELE: (301) 962-3840
FTS TEL: 922-3840

March 27, 1984

(not entered)
(in the)
(docket sheet)

Phillip Mizrach, Esquire
1746 Eastern Avenue
Baltimore, MD 21231

Re: Rajaram v. ITU, et al.

Civil No. B 80-0012

Dear Mr. Mizrach:

This will respond to your letter of March 26, 1984, with its enclosure consisting of a copy of Mr. Rajaram's EEOC charge of discrimination dated August 30, 1978.

Despite your argument to the contrary, I am still of the opinion that

the charge of discrimination in that document was filed only against the two unions listed as defendants therein, that is, Sunpapers Chapel of BTU-12 and the International Typographical Union. The fact that other individuals or organizations were mentioned in the "particulars" section of the EEOC charge does not indicate that they were intended to be defendants before the EEOC. Indeed, the EEOC did not treat them as such, limiting its inquiry to the action of the defendant unions as listed on the charge of discrimination.

It is quite natural that various individuals were mentioned in the "particulars" section, in that an association such as a union can act only through the actions of individuals. However, the mere mention of those individuals' names is not sufficient to constitute them EEOC defendants.

Your argument to the contrary from the wording of the form is unconvincing. Although the form calls for multiple defendants to be listed "below," there is no such listing in the "Particulars" section of the form. In other words, there is no listing of individuals in the "particulars" section, giving their addresses and other data as called for in the "Defendant" section of the form. Furthermore, the word "Continuing" on the form has no reference to a continuing listing from the top to the bottom part of the form, but, rather, clearly refers only to the duration of the alleged discrimination.



For the reasons stated, I am still of the opinion that the EEOC charge was lodged only against the Sunpapers Chapel of BTU-12 and the International

Typographical Union.

Very truly yours,

/s/
Frederic N. Smalkin

FNS/skp

cc Honorable Walter E. Black, Jr.
Bernard W. Rubenstein, Esquire
Ronald Rosenberg, Esquire
Court File

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM, Plaintiff

v. FEB 15 1985

INTERNATIONAL TYPOGRAPHICAL

UNION, et al., Defendants

CIVIL No. B-80-0012

ORDER

Upon consideration of the parties' Exceptions and Objections to the Report and Recommendation of the United States Magistrate, and the responses thereto, and having heard the respective oral arguments of all interested parties, at a hearing on February 13, 1985; in accordance with the Court's oral opinion rendered at the conclusion of oral argument, it is, this 15th day of February, 1985, ORDERED:

1. That Plaintiff's Exceptions and Objections to the Report and Recommendation BE, and the same hereby

ARE, OVERRULED;

2. That summary judgment for defendants BTU-12, Jack Poist and Gary Kidwell, with respect to Plaintiff's Title VII claim concerning the Union by-law provision BE, and the same hereby IS, GRANTED;

3. That Defendants' Exceptions and Objections to the Report and Recommendation in all other respects BE, and the same hereby ARE, OVERRULED;

4. That the recommended disposition in Magistrate Smalkin's Report and Recommendation of February 27, 1985 (sic) BE, and the same hereby IS, ADOPTED IN ITS ENTIRETY; and

5. That the Clerk of Court shall mail copies of this Order to counsel for the parties.

/s/
Walter E. Black, Jr.
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

KONDIAN R. RAJARAM,

PLAINTIFF,

-v-

INTERNATIONAL TYPOGRAPHICAL UNION;
BALTIMORE TYPOGRAPHICAL UNION NO. 12;
SUNPAPERS CHAPEL OF BALTIMORE
TYPOGRAPHICAL UNION NO 12;
JACK POIST, GARY KIDWELL and
A.S. ABELL PUBLISHING COMPANY,

( ) (sic)

Case No. B80-0012

Baltimore, Maryland

April 15, 1987 (entered February 5, 1988)

TRANSCRIPT OF ORAL OPINION

BEFORE THE HONORABLE WALTER BLACK, JR.

A P P E A R A N C E S:

For the Plaintiff:

EDWARD MAKOWSKI, ESQUIRE

PHILLIP MIZRACH, ESQUIRE

For the Defendants:

BERNARD RUBENSTEIN, ESQUIRE

BRIAN A. POWERS, ESQUIRE

Audio Operator:

VERONICA J. CAMERON

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

J & J COURT TRANSCRIBERS
20 Florister Drive
Trenton, New Jersey 08690
(609) 586-4345/586-2311

COURT CLERK: Please rise. Oh yea, oh yea, oh, yea. All persons having business before the United States District Court for the District of Maryland draw near and give your attention. This Honorable Court is now in session. The Honorable Walter E. Black, Jr., presiding.

THE COURT: Good morning.

THE AUDIENCE: Good morning, your Honor.

THE COURT: As I indicated at the end

of the trial day yesterday, it was my intention to have the opportunity to review this matter and rule on it this morning and I'm now prepared to do so. I will do it by means of an informal oral opinion, reserving the right to edit that opinion if it's transcribed for any reason, without in anyway changing the result or any type of meaning.

This law suit was filed on January 4, 1980. Its procedural history is extremely complicated and need not be recited here. The case is being heard by this Court as trier of fact and consists of five of the original sixteen counts of the Second Amended Complaint (Page [sic] 53).

Repeated attempts by the plaintiff to amend the Second Amended Complaint and to reopen claims dismissed long ago were both unsuccessful and sometimes frivolous. A basic summary of the counts

being tried is as follows. Counts 5 and 16 alleged discriminatory practices under 42 U.S.C. 2000(E)(2) (sic) of the Civil Rights Act which prohibits labor organizations from discriminating against a union member or from classifying or failing or refusing to refer for employment a union member because of his "race, color, religion, sex or national origin." 42 U.S.C. Section 2000(E)(2)(C)(1) and (C)(2). (sic)

Count 6 alleges discrimination under 42 U.S.C. Section 2000(E)(3)(A) (sic) of the Civil Rights Act which prohibits an employer from discriminating against an individual for opposing any unlawful employment practice or for making charges, testifying, assisting or participating in enforcement proceedings brought under the Civil Rights Act.

Counts 10 and 11 are for violations of the Labor Management Reporting and

Disclosure Act, and alleged, respectively that the plaintiff was punished for objecting to certain labor practices of the defendants and that the plaintiff was illegally required to spend two years in presenting grievances through union procedures.

The plaintiff in this case, Kondian Rajaram, was born in India and immigrated to this country in the 1960's. Having examined the various groups protected by the Civil Rights Act, the Court is satisfied that the proper characterization of the discrimination alleged in this case is discrimination based on the plaintiff's national origin. The Court also notes in this regard the plaintiff's name, skin color and accent, all factors which support the fact that the plaintiff was of foreign ancestry.

Further, the Court notes that an individual born in India is characterized

as a caucasian and therefore the discrimination alleged here cannot be based on the plaintiff's race. The plaintiff is now a citizen of the United States and has made his home in this country.

Early in the 1970's, after completion of four years of technical education and training, the plaintiff became a journeyman in the printing industry. The defendants represent the hierarchy of union organizations and selected officials within the printing industry; namely the International Typographical Union, the ITU, the Baltimore Typographical Union Number 12, the BUT-12, (sic) the Sunpapers Chapel of the Baltimore Typographical Union Number 12, called the Sunpapers Chapel, Jack Poist, then Chapel Chairman and Gary Kidwell, then Vice-Chairman.

Defendants initially raised a

technical argument regarding the exact named defendants in the original charging document but the Court does not find it necessary to address this issue and, in any event, finds that all of the defendants have had proper notice of the charges alleged in this lawsuit.

The case of Rajaram versus ITU, et al., Civil No. B80-00012 (sic) was finally heard by this court over seven years after it was filed and over ten years since the first incident of wrongdoing alleged in the complaint. After a week of often repetitive testimony, including nearly twelve hours of direct testimony of the plaintiff, and after the presentation of often cumulative and irrelevant evidence, the plaintiff rested its (sic) case.

The defendants immediately moved to dismiss the entire action under Federal Rules of Civil Procedure, Rule 41(b).

Rule 41(b) provides that a defendant in a case tried without a jury may move for dismissal at the close of the plaintiff's evidence on the ground that upon the facts and teh (sic) law, the plaintiff has shown no right to relief. The court as trier of the facts, may then determine the facts and the law and render judgment against the plaintiff if warranted. Unlike a motion for directed verdict, the court is not required to make any special inferences in favor of the plaintiff.

Instead, the court is to weigh the evidence presented, resolve any conflicts in it and decide for itself where the preponderance of evidence lies. 9 Wright & Miller Section 2371 at p. 224. A thorough review of the entire record in this case in combination with the evidence presented to the Court over the past week, convincingly demonstrates to this Court that there is no evidence to

support any of the allegations made by the plaintiff against these defendants. As the Court will grant the defendants (sic) motion to dismiss in this case, it must now set forth its findings of facts and conclusions of law. Federal Rules of Civil Procedure, Rule 52(a).

After becoming a journeyman printer, Rajaram moved to Baltimore, Maryland to seek employment as a proofreader. He was hired in 1974 by the A.S. Abell Publishing Company, who was originally named as a defendant in this action, but who was thereafter dismissed for limitations reasons. Though there were no permanent positions with A.S. Abell, Rajaram was hired as a substitute with the understanding that he would work when needed, and eventually move up until a permanent situation became available. When Rajaram was hired, he signed his name in a logbook which established his

priority/seniority as among the other hires.

One of the ways in which a substitute could work at A.S. Abell was to take the place, temporarily, of a permanent employee who became ill or was absent from work for any reason. These temporary situatüions (sic) were know (sic) as TF's. Substitutes could be assigned to the TF positions in various ways. Among the methods of assignment were by direct request of a permanent situation holder or by showing up at a particular shift and then being chosen based on priority or a lottery-type draw system. Each substitute was required by the union laws to show up two or three times a week, in order to maintain their priority.

From 1974 until the summer of 1976, Rajaram worked as a substitute at A.S. Abell without incident. In July or

August of 1976, Rajaram became aware of a long-term TF of a permanent employees (sic) named Fleisig. Rajaram thought the TF would become available in the Fall of 1976. By that time, Rajaram had worked his way up the list of priorities so that he was relatively certain that he could claim the Fleisig TF.

In anticipation of the long-term assignment, Rajaram planned a lengthy trip to his homeland of India. Plaintiff testified that the purpose of the trip was to get married. The Court finds that the plaintiff did, indeed, get married while in India, but the Court also finds that Rajaram may have taken the trip for other purposes as well, for exsample, to visit a sick relative, and that the union officials reasonably believed the trip included such reasons.

As the trip to India was to last over a month, Rajaram knew that such an

absence would jeopardize his priority position and therefore he sought to pay his union dues in advance. Non-payment of dues is the only way a union member can be lawfully expelled from a union and is one of the ways that a member could lose priority status in the typographical union. In this regard, Rajaram approached defendant Kidwell and requested to pay his dues in advance.

After a few moments hesitation and some discussion probably heated, Kidwell accepted the dues and issued a receipt to Rajaram. The incidents that are the subject of the discrimination and retaliation counts in this case occurred after Rajaram's return from India but are alleged to stem in part from this dues altercation believed by the Court to be nothing more than a trivial and minor incident between Kidwell and Rajaram.

For the sake of simplification, the

Court will address each Count of the Second Amended Complaint in turn beginning with Count 5, which alleges discriminatory actions by the defendants based on plaintiff's national origin. To avoid an immediate dismissal in this case, the plaintiff had to present sufficient evidence to establish a prima facie case. Absent direct evidence of discriminatory treatment, which clearly is not present in this case, those elements required. (sic) the (sic) plaintiff in this case to show: (1) that he was a member of the protected class, (2) that he was qualified for the job assignment; (3) that despite his qualifications, he was not given the job assignment and (4) that, after he was by-passed for the job, the assignment remained open or was given to another individual with similar qualifications. See, for example McDonnell-Douglas Corp.

v. Green, 411 U.S. 792 (1973); Smith v University of North Carolina, 632 F.2d 316 (4th Cir. 1980).

Assuming that the plaintiff did establish a prima facie case of discrimination, the burden of going forward then falls on the defendants to dispel the inference of discrimination raised by the plaintiff by demonstrating legitimate and non-discriminatory reasons for its actions. Citing, McDonnell Douglas, at p. 803.

The plaintiff in turn can rebut by exposing such reasons as pure pretext or subterfuge. Ultimately the establishment of a prima facie case of employment discrimination requires proof by a preponderance of the evidence that the plaintiff was not promoted or dismissed "under conditions which, more likely than not, were based upon impermissible racial considerations." Young v. Lehman, 748 F.

2d. 194, 196 (4th Cir. 1984).

The evidence in the record falls far short of proving either pretext or discrimination. As presented by the plaintiff, the evidence merely supports the existence of a clearly legitimate and non-discriminatory reason for the by-pass of plaintiff regarding the Fleisig TF.

When the plaintiff returned from India in October of 1976, he returned to work as a substitute for A.S. Abell. He did not apply or claim TF positions that surfaced at that time and instead quietly waited for the Fleisig TF to become available. The Court finds that the defendants' reasonable belief at that time was that Rajaram did not request the TF's for personal reasons.

Throughout this period of time, Rajaram protested night work because of health problems and fatigue due to his trip and necessary readjustment to the

United States. There is even some testimony by the union officials that Rajaram had problems sleeping during the day because of a baby crying, though Rajaram subsequently produced evidence that he did not have a baby at that time.

The Court finds that any discrepancy about plaintiff's position regarding his refusal work (sic) nights or failure to claim the TF's is due to his lack of candor with the union officrs (sic) and not because of any bad faith or fabrication on the defendants part.

Consequently when the Fleisig TF did became (sic) available in November of 1976, the Court finds that the union officials reasonably believed that Rajaram would not want the TF because it, too, was a night shift and the union officials were not aware that Rajaram had changed his mind in this regard.

Rajaram was not assigned to the TF

and it has been stipulated by the defendants that Rajaram was the highest priority substitute and was qualified for the position. Instead, another substitute, Lorenzo, with lower priority than Rajaram, began work on the Fleisig TF on Sunday, November 4, (sic) 1976. Earlier that day Rajaram vehemently objected to the assignment at a Chapel meeting.

When the mistake was uncovered, the TF was re-assigned to Rajaram. Rajaram could not begin work until the following week, however, due to a policy of not taking a substitute off of a TF during the middle of the financial workweek. Rajaram did work at other positions during the week of November 14, but it was established by comparison with the workweek of Lorenzo that Rajaram missed one and perhaps two days of work because of the by-pass, for a maximum loss of

less than $120.

It is this by-pass episode the plaintiff specifically contends constitutes an unlawful practice of the defendants by "limiting and depriving the plaintiff's employment opportunities because of his race, color and national origin." The entire circumstances of the incieent (sic) do not bear out such an interpretation. The Court finds that the by-pass was nothing more than an innocent (  ) (sic) on behalf of the union officials. The union officials were called to testify during the plaintiff's case and the Court finds credible the explanation of the union officials that they believed Rajaram did not want the night shift TF position. A legitimate and non-discriminatory purpose has been established and the plaintiff has not rebutted it by showing pretext. The Court finds no evidence of

discrimination.

Count 5 is couched in broad language and the plaintiff argued during trial that the discriminatory practices of the defendants under Section 2000(E)(2), (sic) included not only the by-pass incident, but other situations as well. First, plaintiff alleges that the initial and momentary hesitation of Kidwell to accept an advance payment of dues in August 1976 constituted discrimination based on Rajaram's national origin.

As stated earlier, the Court finds this incident so trivial it hardly bears discussion. Further, the argument that this was the first incident of discrimination alleged by the plaintiff because this was the first ( ) (sic) the defendants learned of Rajaram's national origin is so silly that the Court need not discuss it. Suffice it to say, that they (sic) Court finds no

discrimination regarding the dues incident.

Two other incidents occurring after the by-pass must be given context before the Court can discuss whether any discriminatory ( ) (sic) exists.

Soon after Rajaram began work on then (sic) Fleisig TF, John Banach, an officer of the A.S. Abell Publishing Company sent a letter to the union informing them that various TF positions were being eliminated. The fact that Rajaram's name was not on the list was more likely than not an oversight and was not, in any event, discrimination by the Union and the union officials. Other TF positions were left off the Banach letter as well and, furthermore, the action taken was by the A.S. Abell Company and not these defendants.

When Poist called to verify the letter and seek an explanation on behalf

of the union members, he was told that all of the TF positions were being eliminated and Poist took this to mean the Fleisig TF as well. The real reason for the elimination of TF's, however, is what is crucial here.

A.S. Abell had automated and computerized its company in accordance with new technology in the printing industry and the manpower supplied by the substitute program was just nob (sic) longer needed. The existence of a technologicaal (sic) revolution within the printing industry can hardly constitute discrimination against Rajaram when it equally affected all members situated like Rajaram. The Court notes here that the elimination of the TF positions was in breach of the union contract and the case was taken to arbitration by the union, but that case is not before this Court.

Plaintiff has alleged one final incident against the defendants claimed to constitute a discriminatory limitation and deprivation of plaintiff's employment opportunities because of his national origin. In January of 1977 through February of 1977, a share of the work agreement was in affect among the union members. The Court remains unsure of how exactly the share of the work agreement operated. Poist testified during the plaintiff's case that the share of the work agreement was set up because of the new technology and consequent lack of work for the union members. It was founded on the idea of unionism or helping your brother or sister member because of the decrease in manpower needs.

Apparently a group of members got together and decided to share the wrok (sic) so that if a substitute worked on a

given day he was to give up the right to work the next day unless there were more than enough positions available.

Rajaram was not aware of the share of the work program until Janjary (sic) 19 when he sought assignment of a temporary position by the lottery method, that is, by drawing a number where high number would be given the assignment. Plaintiff contends that he was not allowed to draw and therefore lost job opportunities notably on that day.

At the outset, the Court finds credible Poist's testimony that as Chapel Chairman he never used the lottery or draw method of assignment. Further, a close examination and comparsion (sic) of the work schedules of all the substiitutes (sic) during the relevant periods in January and February do not reflect a discriminatory method of work assignment.

Rajaram was not affected any more or any less than the other substitutes if, indeed, he was affected at all. Rajaram worked successive days and he worked a substantial amount during tha (sic) time. Further, the Court finds that the defendants (sic) reasons for instituting the share of the work system are not only legitimate and non-discriminatory, but laudatory in light of the circumstances regarding the new technology and its tragic affect on the union members.

Finally, when Rajaram objected to the share of the work agrrment, albeit after he evaluated its effect on his own work schedule, the system was abandoned., The Court finds that the share of the wrok (sic) agreement was neither invented by the defendants to discriminate against Rajaram, nor did it have a discriminatory affect on Rajaram.

For all of the above reasons, Count

5 of the Second Amended Complaint must be dismissed.

Count 6 of the Socond Amended Complaint states simply that the defendants discriminated against the plaintiff "because he opposed their unlawful employment practices and policies." The plaintiff alleges, in essence, that the four incidents addressed above were in retaliation for the incidents preceding each one. Obviously, the dues incident was not retaliatory. Plaintiff contends, however, that the job by-pass was in retaliation for plaintiff's insistence upon advance payment of dues and objection to Kidwell's resistence to such payment.

Section 2000(E)(3) (sic) of the Civil Rights Act is couched in terms of discrimination for opposing unlawful employment practice or opposing any

unlawful employment practice or for charging, testifying, assisting or participating in any manner in an investigation, proceeding or hearing brought under the Civil Rights Act. Clearly, the dues incident does not rise to the level of opposing an unlawful employment practice under 2000(E)(3) (sic) and, therefore, the by-pass was not retaliatory.

Furthermore, the Court finds that Kidwell hesitated before accepting payment after explaining to Rajaram that it was difficult to calculate the sum of an advance payment because payment of dues is prorated with the employees (sic) weekly or monthly salary. This fleeting disagreement occurred on the working room floor and not in Kidwell's office and it was inconvenient to accept the dues at that time. Nevertheless, upon Rajaram's insistence the dues were accepted.

The termination of the Fleisig TF while Rajaram occupied it, was not retaliatory because it affected all substitutes equally and its purpose was to make way for advanced technology and not to retaliate against a single substitute because he earlier objected to being by-passed for a job position that was quickly rectified in any event.

Finally, the Court finds that the share of the work agreement was not in retaliatioln (sic) of any of the preceding three incidents. The dues incident amounted to a forgettable disagreement between Kidwell and Rajaram and the reason underlying the termination of the TF positions is obvious.

In regard to the by-pass, the union officials allegedly responsible for the share of the work agreement were also those who believed that the by-pass incident had been remedied and all but

forgotten. The idea that such an elaborate work arrangement was set up to retaliate for Rajaram's objection to the by-pass is illogical. Once Rajaram was reinstated in the Fleisig TF, no further complaints were made until February 19, 1977, over a month after the share of the work agreement was instituted.

The Court finds that the union officials did not retaliate against Rajaram's objection that they long thought it was resolved. In Ross v. Communications Satellite Corporation, 759 F.2d. 355 (4th Cir. 1985), the Fourth Circuit set forth the principles for determining whether an employee has established a prima facie case of retaliationl. (sic) The three elements include: (1) that the employee engage in protected activity; (2) that the employer took adverse employment action against the employee and (3) that a causal

connection existed between the protected activity and the adverse action. Citing Ross, at p. 365.

Plaintiff not only failed to establish that the share of the work agreement constituted an adverse employment action against him, but in no way will the evidence support a causal connection between the dues incident, the by-pass, the termination of TF's and the share of the work agreement. Count 6 of the Second Amended Complaint is, accordingly, dismissed against all of the defendants.

Count 16 of the Second Amended Complaint avers that the defendants, and specifically Poist "arbitrarily and unlawfully classified the Sunpapers Chapel substitute employees into groups to further the practice of employment discrimination. The Court first finds that in regard to the by-pass,

there was no classification under any plausible defintion (sic) of that term. And, neither the plaintiff nor the defendants nor the Court can articulate such a classification. Accordingly, the claim that the by-pass constituted employment discrimination by arbitrary classification of substitute workers, has no merit whatsoever.

Neither could the plaintiff explain to the Court the arbitrary classification of substitutes with regard to the share of the work agreement. Plaintiff initially suggested substitutes were placed into groups based on the day shift, night shift classification. Rajaram, however, worked both day and night, both during the relevant period and before it. Plaintiff suggested that the classification perhaps changed each shift in order to affect Rajaram.

The Court is unable to come up with

a classification that the plaintiff, Rajaram, or the other substitutes were arbitrarily placed into it and plaintiff could not either. Section 2000(E)(2)(C)(2) (sic) does not purport to ban all discrimination, but only the spedific forms enumerated by its provisions, namely, race, color, religion, sex or national origin. See, for example, King v. Seaboard Coast Line Railroad Company, 538 F.2d 581 (4th Cir. 1976).

In the King case drunks were held not to be a classification protected by Title 7 (sic) and in this case a classification into day or night substitutes, if that is the arbitrary classification alleged, is equally not actionable.

Count 16 is symptomatic of the lack of substance in the entire complaint. Seven years after the complaint was

filed, the plaintiff could not articulate what was the arbitrary and discriminatory classification that the plaintiff found so offensive. Count 16 will, likewise, be dismissed for failure to demonstrate a right to relief.

The lack of evidence of any discrimination is forcefully established from the plaintiff's answer to the final question on direct examination in which he expanded for approximately twenty minutes on his complaint against the union, based almost entirely on alleged procedural minimal violations of union work law and mentions discrimination only once, obviously as an after thought.

Apart from the findings above, the Court further finds that the defendant ITU, in contrast to the local unions and its officers, had no contact whatsoever with the various incidents discussed above and should not, under any

circumstances, be a named defendant in Counts 5, 6 and 16.

The two remaining causes of action in this case fall under the Labor Management Reporting and Disclosure Act. 29 U.S.C. Section 401-531. The LMRDA was enacted, inter alia "to eliminate or prevent improper practices on the part of labor organization." Section 401(C).

Count 10 alleges that the defendants abridged the plaintiff's voting rights regarding the share of the work agreement. Section 411 of the LMRDA provides for equal rights and privileges to vote in certain union matters and establishes the right of a union member to express his views regarding union business.

Paramount to a finding that the plaintiff's voting rights were abridged is a finding that there was a vote. Poist testified that there was no such

vote and that the share of the work agreement was nothing more than an informal agreement among several of the substitutes. Rajaram testified that Poist told him that there was a vote but that Rajaram did not believe there was a vote. There is no evidence there was a vote and indeed plaintiff's counsel concedes that that (sic) was no vote as that terms (sic) is commonly defined.

The plaintiff continues to press the fact that a union member has the right to vote at an informal gathering of a minority of workers who determine to share their work for the commendable and altruistic reasons described earlier. The Court, however, finds that there was no vote regarding the share of the work agreement and accordingly, there can be no violation of the voting rights protected by the LMRDA.

The last allegation the plaintiff

has alleged is contained in Count 11 of the Second Amended Complaint and states that the plaintiff "was illegally required by all of the defendants to expend approximately two years in presenting his grievances through union procedures before resorting to administrative or court actions which violated the standard set forth by the Bill of Rights of Members of Labor Organizations. The plaintiff is making reference to Section 411(A)(4) (sic) of the LMRDA which prohibits labor organizations from limiting the right of a member to institute an action in court or before an administrative agency, except that the labor organization can require exhaustion of internal procedures not to exceed a four month lapse of time.

There is no question in this case that Section 43 of the Chapel (sic) Laws required a union member to exhaust all of

its internal remedies upon penalty of expulsion and that Section 43 did not expressly limit the exhaustion requirement to the statutory four montsh. (sic) Though the Court notes the defendants' proffer that the questionable by-law is no longer in existence due to a merger of the ITU with a new union, the issue in this case is whether Rajaram was indeed punished or expelled from the union under Section 43.

The Court can find no case law discussing a claim such as that alleged by Rajaram here. Rajaram attempts to state a cause of action for damages becuase (sic) he followed the union grievance procedures to the end rather than take his suit to a court or administrative agency after four months.

Cases analyzing the validity of a by-law that will expel or fine a member for pursuing his court remedies rather

than exhausting his internal rights involve situations where the union member was indeed fined or expelled. Despite tee (sic) multitude and myriad of actions instituted by Rajaram in various forums, he has never been disciplined or otherwise punished for his legal actions. The local union president, Theodore Kees, who testified during plaintiff's case, stated that never in this history of the union has a member been expelled or otherwise punished in this regard. Indeed, Rajaram remains a member in good standing.

The remedies pursued by Rajaram throughout the union procedures also support the Court's finding that there is no causal action under the LMRDA in this case. At the first level of appeal, Rajaram requested the impeachment of Poist and Kidwell and that Poist and Kidwell be required to make compensation

to every TF for damages by their actions. Rajaram also requested that local union President Kees resign from office.

At the next level of appeal, Rajaram wanted the lower adverse decision declared null, void and corrupt. Again, Rajaram requested impeachment of Poist and Kidwell and Kees. He further requested that the lower appellate board be purged and that it cease to exist. Finally, Rajaram requested compensatory damages of $50,000.

Apart from the monetary damages, the political remedies the plaintiff sought against the union were in no way related to his allegations under the Civil Rights Act. Plaintifff (sic) testified that he merely wanted the union to tell him who was right with regard to the incidents discussed earlier. The relief sought by the plaintiff during the union procedures was not within the province of this

Court.

In any event, the Court is satisfied, beyond all doubt that the plaintiff would have pursued his full remedies under the union procedures whether or not the exhaustion requirement existed. The plaintiff's trek through the various appellate procedures provided by the union was meaningful and not perfunctory by any stretch of the imagination.

The Court finds that the litigous (sic) and persistent individual who testified over a period of three days would have certainly availed himself of every legal avenue possible and indeed continues to do so today.

Consequently, any expense incurred by Rajaram throughout the union appellate process would have been incurred by Rajaram in any event. Further, his proffer that his marriage and life was

ruined by this litigation has not been established by any evidence and the link between his divorce iin (sic) 1983 and this by-law in question, in this particular litigation, is so tenuous as to be non-existent.

Count 11 will be dismissed for failure to prove a right to relief under Section 411(A)(4) (sic) of the LMRDA> (sic)

A final word from the Court is appropriate. As a result of certain technological developments in the printing industry, the plaintiff's mean (sic) of livelihood was substantially reduced. For over ten years, plaintiff has been litigating the results of the development before the Union at all levels, before the EEOC and before both the federal and state trial and appellate courts.

The sequence of events began with a

trivial episode involving an alleged slight by a union official in his reluctance to accept a payment of advance union dues. This escalated to an unparalleled assertion of grievances and claims against both his employer and his union. While the Court has known many sore losers during his lifetime, the plaintiff is unique in that he is best characterized as a sore winner.

His efforts to pay his dues in advance were successful within moments. His objection to the by-pass was recognized and the basis of the grievance was rectified within a week, involving a maximum loss of two days' work or $116.20 in wages. His objection to the share of the work arrangement was recognized and the basis of the grievance was rectified within a month with an additional maximum loss of one day's work, or $58.10 in wages.

Even the plaintiff's objection to the alleged illegal by-law has been met as a result of the recent union merger. Nevertheless, the plaintiff, with the enthusiastic assistance of his counsel continues to occupy the attention of at least five courts in a total distortion of our system of justice.

Plaintiff has alleged in this case that his life has been destroyed, as indeed it has, not by any acts of the defendants but by his own all-consuming battle against unfounded conspiracies. I implore the plaintiff to get on with his life and to abandon this never ending vendetta against his employer and his union, if not for the sake of this nations's (sic) and Maryland's judicial system, then for the sake of his own health and peace of mind.

And, I implore the plaintiff's coulnsel (sic) to abandon their quixotic

quest for victory which has led them to act as counsel in a court where they are not qualified to practice under the Rules of court and to drag everyone involved in this trial, including defense counsel, court personnel and the Court itself, down to their level.

Counsel, I will enter an order in conformity with this ruling.

COURT CLERK: Please rise. This Honorable Court now stands in recess.

* * * * * * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

9/9/87 /s/
Date ELAINE HOWELL

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM Plaintiff

v.

INTERNATIONAL TYPOGRAPHICAL UNION;

BALTIMORE TYPOGRAPHICAL UNION NO. 12;

( ) (sic)

JACK POIST and

GARY KIDWELL Defendants

CIVIL NO. B-80-0012 (entered April 20, 1987)

O R D E R

Presently pending in the captioned case is Defendants' Motion to Dismiss filed pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The motion to dismiss was filed after the close of the plaintiff's case in the nonjury trial of the captioned case. The Court had the benefit of oral argument on behalf of all parties and is satisfied that upon the facts as presented by the plaintiff in his case-in-chief, and upon

the law, the plaintiff has shown no right to relief.

In accordance with the oral opinion rendered by the Court on April 15, 1987, IT IS, this 16th day of April, 1987, by the United States District Court for the District of Maryland,

ORDERED;

(1) That the Defendants' Motion to Dismiss BE, and the same hereby IS, GRANTED;

(2) That the Second Amended Complaint (Paper 53) BE, and the same hereby IS, DISMISSED in full WITH PREJUDICE; and

(3) That the Clerk shall mail copies herewith to counsel of record.

/s/
Walter E. Black, Jr.
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Kondian R. Rajaram, Plaintiff

v.

International Typographical Union, et al., Defendants (entered March) (28, 1985)

Civil No. B-84-2465

MAGISTRATE'S REPORT AND RECOMMENDATION

The A.S. Abell Company ("Abell"), the company defendant in this employment discrimination case, filed a motion to dismiss on June 22, 1984.

* * * *

This case involves a dispute based on Rajaram's allegation that defendants failed to perform in accordance with a 1977 arbitration award. In addition, Rajaram alleges a breach of the duty of fair representation with respect to the Union defendants.

* * * *

Rajaram's first case, 80-0012, was filed

in 1980, and that record is voluminous. Although this case, 84-2465 was originally filed in a state court and removed on defendants' motion to this court, it should have been consolidated with 80-0012.

* * * *

For the reasons stated above, I respectfully recommend that, ...., an order be entered granting defendant Abell's motion to dismiss, and dismissing case no. B-84-2465 in its entirety.

/s/
Frederic N. Smalkin
United States Magistrate

Dated: March 28th, 1985

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

KONDIAN R. RAJARAM,

on behalf of himself and all

others similarly situated

Plaintiff, (entered April) (4, 1985)

v.

INTERNATIONAL TYPOGRAPHICAL UNION, et al., Defendants

CIVIL ACTION NO. B-84-2465

ORDER

Upon consideration ....., it is by the Court , this day of April, 1985,

* * * *

ORDERED, that Magistrate Smalkin's recommended dismissal of Plaintiff Rajaram's claims against the Company Defendants on the ground of res judicata, as set forth in the Report and Recommendation of March 28, 1985, shall be, and hereby is, ADOPTED IN ITS ENTIRETY;

* * * *

Walter E. Black, Jr.
United States District Judge

IN THE CIRCUIT COURT FOR BALTIMORE CITY

KONDIAN R. RAJARAM

vs.

A. S. ABELL PUBLISHING COMPANY

CASE NO.: 84135042/L 20441

REPORTER'S OFFICIAL TRANSCRIPT

April 23, 1986

Baltimore, Maryland

BEFORE: THE HONORABLE JOSEPH H. H. KAPLAN, JUDGE

APPEARANCES:

On behalf of the plaintiff:

EDWARD J. MAKOWSKI, ESQUIRE

On behalf of the Defendant:

JEFFREY P. AYRES, ESQUIRE

REPORTED BY: A. M. GREAVER

Official Court Reporter

* * * *

(at pages 21-24)

THE COURT: And I have heard you all on the merits of the motion to dismiss. I have reviewed the motion to dismiss and

considered the responses to that motion, and I am satisfied that the federal claims and judgments are at issue here and that, because they are at issue here, the federal principles of res judicata and limitations apply.

Even if federal limitations did not apply, state limitations would preclude this cause of action. This lawsuit is barred by federal res judicata principles of claim preclusion. This is because Judge Black's finding of claim preclusion in plaintiff's second federal lawsuit is, itself, res judicata in the case at bar.

The lawsuit, this lawsuit is also barred by federal res judicata principles of issue. This is because of the res judicata effect of final judgments in the plaintiff's two federal lawsuits, both of which held that the plaintiff's claims were barred by limitations and that plaintiff failed to show that A. S. Abell

had fraudulently concealed the 1977 arbitration award.

Even if plaintiff's claims are not barred by res judicata, they are barred by both the federal six month statute of limitations and the applicable state period of limitations. As you both know, in the first federal case, the Fourth Circuit Court of Appeals held that the six month limitation period applied to Taft-Hartley Act violations. Accordingly, this entire lawsuit should be dismissed, notwithstanding the purported class claims.

Under my conclusion that Judge Black's decision in the second federal case, dismissing the case, notwithstanding the purported class claims, binds this Court under the principles of res judicata, and as I have indicated, even if res judicata doctrine does not apply, the purported class is

too small for certification, that is 24 people, and plaintiff cannot adequately represent a class, and no other class members have pursued an interest in this case.

For the foregoing reasons and those set forth in the defendant's motion, the Court will grant that motion to dismiss and dismiss this case.

Mr. Ayres, if you will prepare an order in accordance with my ruling, I will sign it.

MR. AYRES: Yes, Your Honor.

THE COURT: Thank you, gentlemen.

MR. MAKOWSKI: Thank you, Your Honor.

THE COURT: We will stand in recess.

(Proceedings concluded.)

REPORTER'S CERTIFICATE ....

A. M. Greaver
Official Court Reporter

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IN THE CIRCUIT COURT FOR BALTIMORE CITY

CASE NO.: 84-135042/L20441

KONDIAN R. RAJARAM, Plaintiff,

v.

A.S. ABELL PUBLISHING COMPANY, Defendant.

ORDER

Upon consideration ...., it is by the Court, for the reasons provided at the hearing of April 23, 1986, this 23rd day of April, 1986,

* * * *

ORDERED, that this entire lawsuit shall be, and ( ) (sic) hereby is, DISMISSED WITH PREJUDICE; and it is further

ORDERED, that Plaintiff's Request for Class Certification shall be, and the same hereby is, DENIED; and it is further

ORDERED, that JUDGMENT shall be, and the same hereby is, ENTERED in favor of Defendant and against Plaintiff on all

claims, on all relief, and with respect to this entire action; ....

JUDGE JOSEPH H.H. KAPLAN
Joseph H. H. Kaplan
Administrative Judge

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[[ Rule 14.1.(k)(iii) ]]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

July 13, 1990

No. 89-3375

KONDIAN R. RAJARAM Plaintiff-Appellant

v.

INTERNATIONAL TYPOGRAPHICAL UNION;
BALTIMORE TYPOGRAPHICAL UNION NO. 12;
JACK POIST; GARY KIDWELL

Defendants-Appellees

and

SUNPAPERS CHAPEL OF BALTIMORE
TYPOGRAPHICAL UNION NO. 12;
A.S. ABELL PUBLISHING COMPANY

Defendants

O R D E R

Upon consideration of the appellant's pro se petition for rehearing, IT IS ORDERED that the petition for rehearing is denied.

For the Court,
JOHN M. GREACEN

CLERK

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[[ Rule 14.1.(k)(v) ]]

(Entered February 5, 1988)

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

KONDIAN A. (sic) RAJARAM, Plaintiff,

vs.

INTERNATIONAL TYPOGRAPHICAL UNION, et al., Defendants.

DOCKET NO. B-80-12 (sic)

APRIL 9, 1987

TRANSCRIPT OF TRIAL BEFORE

HONORABLE WALTER E. BLACK, JR.

APPEARANCES:

For the Plaintiff:

EDWARD JACK MAKOWSKI, ESQUIRE

PHILLIP MIZRACH, ESQUIRE

1746 Eastern Avenue

Baltimore, MD 21231

563-0990

For the Defendant: (sic)

BERNARD W. RUBENSTEIN, ESQUIRE

PATTY L. PARSONS, ESQUIRE

Abato, Rubenstein and Abato, P.A.

Suite 308, 2360 W. Joppa Road

Lutheville, MD 21093-4697

(301) 321-0990

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* * * *

(between pages 3 and 27)

MR. MAKOWSKI: Well, your Honor .... there was an action filed in the State Court which asked that the State Court confirm an arbitration award. There was an action brought in this case, B-80-0012 and Magistrate Smalkin later on in case B-84-2465, which was the -- a case filed at the same time as the case in State Court seeking confirmation and it was moved over the the Federal Court.

Magistrate Smalkin found that he so cited in his report on 2465 that the matter of the arbitration award was part of case B-80-0012, which is the case presently before this Court.

.... However, there was no claim with regard to failure to represent against the union for not enforcing that arbitration award.

* * * *

MR. MAKOWSKI: Your Honor, this -- Magistrate Smalkin found in 2465 that it was, or should have been, part of this case. That --

THE COURT: Well, is it in this case:

MR. MAKOWSKI: According to the report in 2465, it could be in this case and that's why --

THE COURT: It is not.

* * * *

MR. MAKOWSKI: Your Honor, I'm not requesting --

MR. RUBENSTEIN: So what do you want him to do?

MR. MAKOWSKI: Your Honor, I'M not requesting an amendment, I think the Court stated yesterday that this matter of the arbitration was determined in another forum. Which forum? I have looked at the EEOC proceedings; I have looked at the NLRB proceedings; I was involved in the State Court proceedings.

THE COURT: I am sorry, Mr. Makowski, if my inadvertant use of words have caused you all to burn the midnight oil to reconstruct an issue, because I didn't mean it that explicitly. .... I wasn't saying that there was a dispositive ruling on it.

* * * *

MR. MAKOWSKI: I'm telling you that Magistrate Smalkin found that it either was or could have been part of this case.

* * * *

THE COURT: Okay. Well, file a new suit.

MR. MAKOWSKI: We cannot, your Honor --

THE COURT: I only have one chance out of nine of getting it, so file a new suit, Mr. Rubenstein and Mr. Powers can see you again at a later date.

MR. MAKOWSKI: Your Honor, we would like -- Mr. Rajaram would be barred then, his claim could be possibly considered barred for a late file, however, this case would have been timely filed.

* * * *

MR. MAKOWSKI: Your Honor, I would like to offer a copy of Magistrate Smalkin's report in Case B-84-2465.

MR. RUBENSTEIN: Objection.

MR. MAKOWSKI: It is marked as Exhibit Number 84.

THE COURT: Objection sustained.

MR. MAKOWSKI: .... Mr. Rajaram had

vested rights in that and it couldn't be determined until the transcript of the arbitration was acquired by him, that he didn't have standing even to bring the action until the union's time to enforce had elapsed.

* * * *

THE COURT: What matter was not resolved by the NLRB?

MR. POWERS: The arbitration award.

MR. MAKOWSKI: The arbitration matter.

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